



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

January 22, 1998

Ms. Joan Carol Bates
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0220

Dear Ms. Bates:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 111804.

The Texas Department of Health (the "department") received a request for "a copy of the Financial Statements (projecting the income revenue streams) for each of the seven HMOs (HMO Blue, ACCESS, Americaid, AmeriHealth, Community Health Choice, Methodist, PCA) contracted with TDH for Medicaid/Medicare (Star and Star+) in Harris County, Texas." You raise a concern that the requested information may be proprietary, and therefore excepted from required public disclosure under section 552.110 of the Government Code. You have submitted for our review the requested information at issue for the seven requested companies, AmeriHealth HMO of Texas, Inc. ("AmeriHealth"), MSCH ACCESS Health Plan, ("ACCESS"), Americaid, HMO Blue, West Texas ("HMO Blue"), PCA Health Plans of Texas ("PCA"), Harris Methodist Texas Health Plan ("Methodist") and Community Health Choice, Inc. ("Community Health Choice").

Since the property and privacy rights of third parties may be implicated by the release of the requested information, this office notified the seven companies whose financial statements were requested. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Open Records Act in certain circumstances).

Only AmeriHealth and Community Health Choice responded to our notice; therefore, we have no basis to conclude that the information pertaining to the other five companies is excepted

from disclosure. See Open Records Decision Nos. 639 (1996) at 4 (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure), 552 (1990) at 5 (party must establish prima facie case that information is trade secret), 542 (1990) at 3. Thus, the requested information relating to ACCESS, Americaid, HMO Blue, PCA and Methodist must be released to the requestor.

AmeriHealth argues that its financial information is excepted from disclosure under sections 552.104, 552.110 and 552.112. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets, and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); see also Open Records Decision No. 552 (1990) at 2. Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 (1990) at 5-6.

Upon review of the arguments submitted by AmeriHealth and the information submitted to the department, we conclude AmeriHealth has not established that the submitted information is protected as commercial or financial information or a trade secret, and thus this information may not be withheld under section 552.110.²

AmeriHealth also argues that sections 552.104 and 552.112 except the information within its proposal from public disclosure. Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the department does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Gov't Code § 552.104 may be waived by a governmental body). Furthermore, section 552.104 is inapplicable when the bidding on a contract has been completed and the contract is in effect. *See, e.g.*, Open Records Decision Nos. 541 (1990) at 5, 514 (1988) at 2, 319 (1982) at 3. Therefore, the requested information may not be withheld under section 552.104. Likewise, we do not believe that section 552.112 is applicable in this instance, since the department does not seek to withhold the information at issue based on this section. *See* Open Records Decision No. 522 (1989) at 4 (governmental body may decide not to raise permissive exceptions); Open Records Letter No. 97-0301 (1997) at 3-4. The AmeriHealth information may not be withheld pursuant to section 552.112 and thus, it must be released to the requestor.

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 (1982) at 2, 306 (1982) at 2, 255 (1980) at 2.

²We note the AmeriHealth materials submitted to this office contain an attachment relating to an entity known as "Independence Blue Cross." It is unclear to this office how this information is responsive to the request and therefore, this ruling does not address whether this information must be released to the requestor. We caution, however, that this information may be confidential by law or may implicate the proprietary interest of a third party. *See* Gov't Code § 552.352 (distribution of confidential information may constitute criminal offense).

Community Health Choice argued that its financial information is excepted from disclosure as commercial or financial information under section 552.110. Upon review of the arguments submitted by Community Health Choice, we conclude it has not established that substantial competitive harm would result to its competitive position upon release of the requested information and therefore, this information may not be withheld under section 552.110 and must be released to the requestor.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 111804

Enclosures: Submitted documents

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